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**MAY 16 2007**

**OFFICE OF PETITIONS**

In re Application of	:	
George Brainard	:	
Application No. 09/853428	:	DECISION ON PETITION
Filing or 371(c) Date: 05/10/2001	:	
Attorney Docket Number:	:	
BRA01-NP002	:	

This is a Decision in response to the Petition to Revive an Unintentionally Abandoned Application Under 37 C.F.R. § 1.137(b), filed August 1, 2006; the "Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003", and "Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 C.F.R. § 1.48(a)". The delay in treating this petition is regretted.

This Petition is hereby **dismissed**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Request for Reconsideration of Petition under [insert the applicable code section]". This is **not** final agency action within the meaning of 5 U.S.C. § 704.

**Background**

The above-identified application became abandoned for failure to timely and properly reply to the non-final Office action, mailed October 24, 2003, and re-mailed November 7, 2003. The Office action set a three (3) month period for reply.

Applicant filed an Amendment on November 10, 2003, and a Notice of Appeal on May 10, 2004; however, Applicant failed to file a brief in support of Appeal. Since no claims were allowed, the application became abandoned for failure to timely and properly reply to the non-final Office action mailed November 7, 2003, on February 8, 2004.

Applicant files the instant petition, Request for Continued Examination ("RCE"), a "Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003", and "Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 C.F.R. § 1.48(a)".

Applicant's request for reconsideration of the Office action

A review of Office records revealed that Applicant filed a Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003. Because the application became abandoned for failure to timely and properly reply to the November 7, 2003 Office action, and because Applicant requested reconsideration of the Office action, a Decision on the petition to revive the application was held in abeyance pending resolution of Applicant's Request for Reconsideration. The Application was referred to Technology Center Art Unit 3739 for consideration of the Request for Reconsideration of Letter Restarting Period of Response Mailed November 7, 2003.

Applicant's Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 C.F.R. § 1.48(a))

In response to Applicant's Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 C.F.R. § 1.48(a)), Applicant was advised as to the requirements for a grantable petition to correct inventorship under 37 CFR 1.48.

Decision on Applicant's request for reconsideration of the Office action

In a decision mailed May 10, 2007, this Office dismissed Applicant's request for reconsideration of the Office action.

The petition under 37 CFR 1.137(b)

A grantable petition pursuant to this paragraph must be accompanied by:

- (1) The reply required to the outstanding Office action or notice, unless previously filed;
- (2) The petition fee as set forth in § 1.17(m);
- (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Director may require additional information where there is a question whether the delay was unintentional; and (4) Any terminal disclaimer (and fee as set forth in § 1.20(d)) required pursuant to paragraph (d) of this section.

The required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination ("RCE") in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must include payment of the issue fee or any outstanding balance. In an application, abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

As to item (1), Applicant filed a RCE and a "Request for Reconsideration of Letter Restarting Period of Response Mailed on November 7, 2003<sup>1</sup>". However, an applicant cannot request continued examination of an application until after prosecution in the application is closed. See 37 CFR 1.114(a). Prosecution in an application is closed if the application is under appeal, or the last Office action is a final action (37 CFR 1.113), a notice of allowance (37 CFR 1.311), or an action that otherwise closes prosecution in the application (e.g., an Office action under Ex parte Quayle, 25 USPQ 74, 453 O.G. 213 (Comm'r Pat. 1935)).

In this instance, the application became abandoned for failure to timely and properly reply to the non-final Office action, re-mailed November 7, 2003. As such, prosecution of the application is not closed, and the RCE is not a proper reply to the Office action.

The MPEP further provides that "[i]f prosecution in the application is not closed, applicant will be notified of the improper RCE and any amendment/reply will be entered." However, in this instance, Applicant did not file an Amendment responsive to the Office action with the RCE. As such, Applicant has failed to file a reply to the Office action.

In view of the above, the petition is dismissed. Applicant should file a request for reconsideration of petition and include the required reply.


Further correspondence with respect to this matter should be addressed as follows:

By mail: Director for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

By FAX: (571) 273-8300  
Attn: Office of Petitions

By hand: Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this petition Decision should be directed to the undersigned at (571) 272-3232.

  
Derek L. Woods  
Attorney  
Office of Petitions

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<sup>1</sup> Applicant also filed a "Supplemental Amendment, Petition and Fee to add Originally Erroneously Named Inventors in Declaration (37 C.F.R. § 1.48(a))", however, the Supplemental Amendment was to add inventor(s) and was not responsive to the office action.